SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

REPLY BRIEF ON BEHALF OF PETITIONERS

Respondents' Brief in Opposition makes statements which are inaccurate or require further comment.

1. In *Skidmore* v. *Swift & Co.*, 323 U. S. 134, this Court did not hold that sleeping and eating time should be excluded from a judgment for plaintiffs. Plaintiffs sued for all hours spent on the premises. This Court reversed the judgment for defendants and remanded the cause, stating the principle of "predominance of benefit". It in no way held or directed that there should be excluded from the judgment for plaintiffs hours when plaintiffs were permitted to sleep and eat but which they were required to spend on the premises, nor did it consider the fact conditions concerning such hours. In pursuance of the principle of the *Skidmore* and *Wantock* cases the District Court stated in its opinion (R. 331): "The court is of opinion that plaintiffs were employees of defendants in a stand-by capacity during the time they were in their bunks, as well

as during the remaining 16 hours when they were not engaged in active assigned tasks."

2. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359, there is no doubt that the eating time issue was passed upon by the Circuit Court of Appeals for the Tenth Circuit. It was raised by Assignment of Error.* The Court expressly stated (p. 362) first, that the District Court "found that the employer had erroneously deducted one-half hour lunch periods from the work day" and accordingly added overtime for this period, and second, that it affirmed the liability for damages "as computed and awarded by the trial court."

3. The District Court found (R. 375): "The Court further finds that the firemen, before voting, were given to understand that if they wanted to retain their jobs as firemen they would be required to vote for the plan, and, if they did not vote for the plan, they would be transferred to another department in the plant or discharged. * * * The Court further finds that a number of the plaintiffs did not understand what their wages would be under the two-platoon system." This was the finding on how it was that the firemen finally voted for the plan they had twice before rejected.

Respondents suggestion that this finding has no support in the record (p. 10) is erroneous. The record contains testimony that the men were given to understand that the alternative to a favorable vote was a release (R. 58), or transfer to other jobs of unspecified pay and character (R. 33, 37), and that indeed there was no alternative since the two-platoon plan would be installed in any event (R. 90). Men were thus pressured into voting for the plan even

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* Assignment of errors, No. 5 and No. 7, presented to the Circuit Court of Appeals, and contained in the record of the case before this Court, No. 222, October Term, 1943.

though they did not then understand what their pay would be under the two-platoon plan (R. 33, 58, 67). The form of the ballot (R. 290), and the testimony of defendant's witness Mortenson (R. 153), were emphasized by the trial court not as the sole evidence but as generally corrobatory admissions supporting the finding.

4. At the last respondents are unwilling to stand on the stark ruling below that men are bound by agreements not to receive pay whether or not they are given normal sleeping accommodations. Respondents contend (p. 14) that the sleep was adequate, quoting language in the *Rokey* opinion that those plaintiffs had normal sleeping accommodations. But the record in this case shows that the men in these plant domitories were subject to unusual loud noises, including a loud plant radio which was not turned down even after their complaint, guards walking through the sleeping quarters to use the toilet, and a number of other disturbances to sleep pointed out by the firemen (see record references, petition, p. 13) and stated in the findings (R. 377-378).

5. The importance of the questions presented, as outlined in the petition (p. 17), is not challenged by respondents.

Respectfully submitted,

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